UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHERYL WYMAN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 01-99-B***
	)	
LARRY G. MASSANARI,	)	
Acting Commissioner of Social Security,[1]	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from arthritic changes in her hips, low back and right knee, is capable of making an adjustment to work that exists in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and remanded for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the medical evidence established that the plaintiff

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 20, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

had arthritic changes in her hips, low back and right knee as well as pain in her buttocks and down her entire right side, impairments that were severe but did not meet the criteria of any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 28; that she lacked the residual functional capacity to lift and carry more than twenty pounds or more than ten pounds on a regular basis and required a sit/stand option after fifteen to twenty minutes, and that she also had some restriction as a result of pain and prescribed pain medication that impeded her ability to concentrate on or attend to work on a sustained basis, Finding 5, *id*.; that she was unable to perform her past relevant work as a shoe shop worker, woolen mill worker, waitress or cook, Finding 6, *id*.; that her capacity for the full range of light work was diminished by her somewhat reduced ability to concentrate on or attend to work tasks on a sustained basis, Finding 7, *id*. at 29; that, based on an exertional capacity for light work as well as her age (41), educational background (limited) and work experience (unskilled), Rule 202.17 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a conclusion that she was not disabled, Findings 8-11, *id*.; that, although she was unable to perform the full range of light work, she was capable of making an adjustment to work existing in significant numbers in the national economy, Finding 12, *id*.; and that she therefore had not been under a disability at any time through the date of decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

For purposes of both SSD and SSI, the administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7.[3] The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff identifies a single error: that in propounding hypothetical questions to a vocational expert, the administrative law judge neglected to add that the plaintiff's residual functional capacity was diminished by her reduced ability to concentrate on or attend to tasks on a sustained basis. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). On this basis the plaintiff seeks remand for the taking of additional testimony from a vocational expert. *Id*. at 3. I agree that the relief requested is warranted.

I. Discussion

As the plaintiff points out, *id*., the administrative law judge found that as a side effect both of pain and pain medication, the plaintiff's ability to concentrate or attend to work tasks on a sustained basis was impaired, Findings 5, 7, Record at 28-29.[4] Nonetheless, the administrative law judge omitted to relay this impairment when propounding hypothetical questions to vocational expert Sharon

[3] Inasmuch as the plaintiff was found to be insured, for purposes of SSD, through at least December 31, 1998, Finding 1, Record at 28, and the administrative law judge's decision issued on May 26, 1998, *id*. at 30, there was no need to perform a separate analysis of whether the plaintiff was disabled as of her date last insured.

[4] In response to a request to describe the side effects of her medication, the plaintiff testified at hearing, "I have to go lay down, they put me out." Record at 55. In completing a "Pain Report – Adult," she also noted that the medication Lortab "may be habit forming – *(continued on next page)*

Greenleaf. Record at 53-55. The administrative law judge then relied on the testimony she elicited from Greenleaf to determine that the plaintiff was "capable of making a vocational adjustment to work as a receptionist, cashier, and clerical [sic]." *Id*. at 27; *see also id*. at 54-55.

It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs*., 670 F.2d 374, 375 (1st Cir. 1982). "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions." *Id*.

The administrative law judge failed to do this. One cannot be confident that the error was harmless. When asked by the plaintiff's representative to assume that the hypothetical claimant posited by the administrative law judge depended on use of a cane and experienced significant side effects from pain medications (*i.e*., having to lie down, being "put . . . out"), Greenleaf testified that this would affect the claimant's ability to perform the jobs she had just identified, noting, "The cane I, I don't see as much of a problem but the pain medication, if you're not able to work, I mean for two hours at a clip, that would be a big problem." Record at 55.[5]

The commissioner having failed to meet his Step 5 burden of demonstrating that the plaintiff could make an adjustment to work available in significant numbers in the national economy, the plaintiff is entitled to the relief requested.

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causes doziest [sic]." *Id*. at 152.

[5] At oral argument, counsel for the commissioner contended that the administrative law judge used the Grid "as a framework" to find the plaintiff disabled and that the plaintiff's side effects of medication were not substantial enough to erode reliance on the Grid. However, inasmuch as the administrative law judge relied on the vocational testimony to determine that the Grid supportably could be used as a "framework," *compare* Findings 11-12, Record at 29, *with id*. at 54, the lack of an adequate foundation for that testimony necessarily undermined reliance on the Grid.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the cause **REMANDED** for the taking of additional testimony from a vocational expert.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of November, 2001.

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David M. Cohen
United States Magistrate Judge